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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 EDWARD E. JONES,

12 Plaintiff,

13 v.

14 WARDEN C. CULLEN, et al.,

15 Defendants.
16
17

No. C 10-04048 JF (PR)

ORDER OF DISMISSAL

18 Plaintiff, a California prisoner proceeding pro se, filed a civil rights complaint
19 pursuant to 42 U.S.C. § 1983. In his complaint, Plaintiff states that his administrative
20 appeal is still pending at the highest level at the time he filed the instant action.
21 Consequently, this case is DISMISSED without prejudice for failure to exhaust
22 administrative remedies.
23

24 **DISCUSSION**

25 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321
26 (1996) ("PLRA") provides: "No action shall be brought with respect to prison conditions
27 under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail,
28 prison, or other correctional facility until such administrative remedies as are available

1 are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is mandatory and not left to the
2 discretion of the district court. Woodford v. Ngo, 548 U.S. 81, 84 (2006). Exhaustion is
3 a prerequisite to all prisoner lawsuits concerning prison life, whether such actions involve
4 general conditions or particular episodes, whether they allege excessive force or some
5 other wrong, and even if they seek relief not available in grievance proceedings, such as
6 money damages. Porter v. Nussle, 534 U.S. 516, 524 (2002). All available remedies
7 must be exhausted; those remedies “need not meet federal standards, nor must they be
8 ‘plain, speedy, and effective.’” Id. (citation omitted). Even when the prisoner seeks relief
9 not available in grievance proceedings, notably money damages, exhaustion is a
10 prerequisite to suit. Id.; Booth v. Churner, 532 U.S. 731, 741 (2001). Prisoners cannot
11 avoid the administrative exhaustion requirement by requesting relief not available in the
12 appeals system, such as monetary relief, or by simply declaring the process futile. The
13 exhaustion requirement requires “proper exhaustion” of all available administrative
14 remedies. Ngo, 548 U.S. at 93.

15 The State of California provides its prisoners and parolees the right to appeal
16 administratively “any departmental decision, action, condition or policy perceived by
17 those individuals as adversely affecting their welfare.” Cal. Code Regs. tit. 15, §
18 3084.1(a). In order to exhaust available administrative remedies within this system, a
19 prisoner must proceed through several levels of appeal: (1) informal review, (2) first
20 formal written appeal on a CDC 602 inmate appeal form, (3) second formal level appeal
21 to the institution head or designee, and (4) third formal level appeal to the Director of the
22 California Department of Corrections and Rehabilitation. Barry v Ratelle, 985 F. Supp
23 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. 15, § 3084.5). A final decision
24 from the Director’s level of review satisfies the exhaustion requirement under § 1997e(a).
25 See id. at 1237-38.

26 Because exhaustion under § 1997e(a) is an affirmative defense, a complaint may
27 be dismissed for failure to exhaust only if failure to exhaust is obvious from the face of
28 the complaint and/or any attached exhibits. Wyatt v. Terhune, 315 F.3d 1108, 1119-20

1 (9th Cir. 2003). The Court may dismiss a complaint for failure to exhaust where the
2 prisoner “conce[des] to nonexhaustion” and “no exception to exhaustion applies.” Id. at
3 1120.

4 Here, Plaintiff concedes in his complaint that the appeal is still pending at the
5 director’s level. (Compl. at 2.) He states that he is “enduring the appellate process” and
6 that “while awaiting further adjudication, Plaintiff was transferred to the very ‘dorm
7 setting’ that has [him] suffering.” (Id.) However, an action must be dismissed unless the
8 prisoner exhausted his available administrative remedies before he or she filed suit, even
9 if the prisoner fully exhausts while the suit is pending. McKinney v. Carey, 311 F.3d
10 1198, 1199 (9th Cir. 2002); see Vaden v. Summerhill, 449 F.3d 1047, 1051 (9th Cir.
11 2006) (where administrative remedies are not exhausted before the prisoner sends his
12 complaint to the court it will be dismissed even if exhaustion is completed by the time the
13 complaint is actually filed). As it is clear from the complaint that Plaintiff did not exhaust
14 his available administrative remedies before he filed the instant action, dismissal without
15 prejudice is appropriate even if he may have by now completed the review at the third
16 level. See id.

17 Accordingly, the above-titled action is hereby DISMISSED, without prejudice to
18 Plaintiff’s refiling his claim after all available administrative remedies have been
19 exhausted.

20 IT IS SO ORDERED.

21 DATED: 1/25/11

22 
JEREMY FOGEL
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

EDWARD E JONES et al,
Plaintiff,

Case Number: CV10-04048 JF

CERTIFICATE OF SERVICE

v.

C. CULLEN, et al.,
Defendants.

_____/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 2/16/11, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Edward E. Jones E38291
CSP-SATF V
P.O. Box 5248
FAC. B-3-157L
Corcoran, CA 93212

Dated: 2/16/11_____

Richard W. Wieking, Clerk